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No. 88-745

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the Eleventh Amendment bars the United States, in a federal court action under the Federal Tort Claims Act, from seeking contribution against the State of New York.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 853 F.2d 124. The opinion of the district court (Pet. App. 1c-7c) is reported at 668 F. Supp. 339. The district court's earlier order denying the State of New York's motion to dismiss (Pet. App. 1b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1988. The petition for a writ of certiorari was filed on October 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Harold Blauer died in 1953 from drug injections given as part of a testing program administered by the New York State Psychiatric Institute (NYSPI); the pro-

gram itself was part of a secret chemical warfare experiment conducted at the behest of the United States Army. Blauer's widow sued petitioner, the State of New York, for her husband's wrongful death. In 1955, the parties agreed to an $18,000 settlement, which the New York Court of Claims ratified. As part of the settlement, Blauer's estate executed a release in favor of petitioner, NYSPI doctors, and the supplier of the drug that had caused Blauer's death. The United States was not a party to that action, but it had agreed with petitioner to pay half of the settlement. Blauer's estate was not aware of that arrangement. Pet. App. 4a, 15a.

In August 1975, the Secretary of the Army disclosed the Army's role in Blauer's death. Elizabeth Barrett, Blauer's daughter and the administratrix of Blauer's estate, then filed three actions under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, in the United States District Court for the Southern District of New York against the United States and a number of individuals for their negligence in causing her father's death.[1] Following consolidation and protracted preliminary litigation,[2] the district court ultimately held a

[1] Barrett originally had named the State of New York as a defendant. The district court dismissed petitioner from the lawsuit on the basis of the Eleventh Amendment. Pet. App. 5a.

Barrett also tried to file a second lawsuit against petitioner in state court, but the court denied that application without prejudice. *Barrett v. State*, 85 Misc. 2d 456, 378 N.Y.S.2d 946 (Ct. Cl. 1976).

[2] The district court initially had dismissed Barrett's claims as time-barred under the FTCA, but the court of appeals reversed. *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983). Following the remand, former federal and state attorneys who were named as defendants moved for dismissal on the grounds of qualified and absolute immunity. The district court granted the motion of David Marcus, the former Assistant Attorney General of the State of New York, but denied the motions of the former federal

trial. On June 4, 1987, the court entered judgment against the United States in the amount of $702,044. Pet. App. 4a-5a.

2. In May 1986, the United States, under 28 U.S.C. 1345 and Fed. R. Civ. P. 14,[3] moved to file a third-party complaint against petitioner. On June 27, 1986, the district court granted the motion and severed that action from the underlying FTCA lawsuit. Petitioner then moved to dismiss the third-party complaint contending, among other things, that the Eleventh Amendment barred that action.[4] The district court deferred consideration of the matter pending the outcome of the FTCA lawsuit. After entering judgment in that case against the United States, the district court denied petitioner's motion to dismiss the third-party complaint insofar as it sought contribution from petitioner as a joint tortfeasor. Pet. App. 5a-6a, 2c.

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attorneys. The court of appeals affirmed those rulings. *Barrett* v. *United States*, 798 F.2d 565 (2d Cir. 1986). Eventually, the district court dismissed for lack of personal jurisdiction the claims against the former federal attorneys and judgment was entered in favor of the individual defendants who proceeded to trial. See *Barrett* v. *United States*, 660 F. Supp. 1291 (S.D.N.Y. 1987).

[3] Section 1345 of Title 28 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

[4] Petitioner also argued that the third-party complaint should be dismissed on the grounds that the 1955 release barred any action for contribution, that the prior state court judgments precluded the United States' claim, and that the complaint itself failed to state a claim for relief. The district court denied those contentions as well (Pet. App. 2c-5c), and the court of appeals declined to exercise "pendent appellate jurisdiction" over those issues (Pet. App. 17a). Petitioner does not challenge that aspect of the court of appeals' judgment.

The district court rejected petitioner's contention that the FTCA "requires that the United States be treated as if it were a private party * * * for the purpose of applying the Eleventh Amendment" (Pet. App. 6c).

3. The court of appeals affirmed.[5] It recognized that the Eleventh Amendment does not prohibit the United States from suing a state in federal court (Pet. App. 6a), and following *United States* v. *Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987), held that the United States could bring a third-party claim for contribution against a state in an FTCA action naming the United States as defendant (Pet. App. 9a-10a). Here, New York had provided a right of action against the state as a joint tortfeasor, but had attempted to limit such actions to state courts.[6] The court of appeals concluded that where New York has consented to liability for contribution, "thus providing the United States with a valid claim under state law, neither the eleventh amendment nor any state law bars federal jurisdiction with respect to such a claim by the United States" (Pet. App. 13a-14a).[7] The court reasoned that the state's

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[5] The United States had urged the court of appeals to dismiss petitioner's interlocutory appeal because the Eleventh Amendment claim was frivolous (Pet. App. 3a; Gov't Br. 20). The court of appeals, however, accepted jurisdiction over the appeal under 28 U.S.C. 1291 "because the district court's denial of [petitioner's] motion on eleventh amendment immunity grounds constituted a reviewable collateral order" (Pet. App. 3a (citing *Minotti* v. *Lensink*, 798 F.2d 607, 608 (2d Cir. 1986, cert. denied, No. 86-6289 (June 1, 1987))).

[6] See N.Y. Ct. Cl. Act § 8 (McKinney 1963) (assuming liability in tort); *Bay Ridge Air Rights, Inc.* v. *State*, 44 N.Y.2d 49, 404 N.Y.S.2d 73, 375 N.E.2d 29 (1978) (recognizing right of contribution against the state).

[7] Petitioner relied on cases such as *Horton* v. *United States*, 622 F.2d 80 (4th Cir. 1980) (per curiam), and *Hill* v. *United States*, 453 F.2d 839 (6th Cir. 1972). The court of appeals distinguished those cases on the ground that the relevant state law at issue, unlike New

effort to defeat federal court jurisdiction failed because the Constitution vests jurisdiction of suits involving the United States in the federal courts (see Art. III, § 2, Cl. 1), and Congress has expressly provided for federal district court jurisdiction over such suits brought by the United States (see 28 U.S.C. 1345) (Pet. App. 14a).

The court of appeals further held that the FTCA itself does not call for a different result. The FTCA defines the standard of liability when the United States is a defendant; the statute does not affect the federal government's rights as a plaintiff. As the court of appeals observed, the United States, although agreeing in the FTCA to be treated as a private individual defendant under state law, had not consented to be treated as a private individual in all respects. For example, the FTCA expressly bars recovery of punitive damages and prejudgment interest against the United States, and the statute vests exclusive jurisdiction of tort claims against the United States in the federal courts. Pet. App. 14a-15a. In light of such exceptions to the " 'private individual' status of the United States under the FTCA," the court of appeals declined to "read the FTCA as limiting or abrogating either the power of the United States that is implicit in our federal system to maintain, or the jurisdiction of the federal courts that is vested by Article III of the federal Constitution to hear and decide, an action against a state in federal court" (Pet. App. 15a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other

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York law, "did not provide a basis for recovery by the United States against the pertinent state 'third-party defendant in any court" (Pet. App. 10a (footnote omitted)).

court of appeals. Accordingly, review by this Court is not warranted.[8]

1. Petitioner concedes (Pet. 8) that the Eleventh Amendment does not prohibit the United States from suing a state in federal court. See, *e.g.*, *Arizona* v. *California*, 460 U.S. 605, 614 (1983) ("Nothing in the Eleventh Amendment 'has ever been seriously supposed to prevent a State's being sued by the United States.' " (quoting *United States* v. *Mississippi*, 380 U.S. 128, 140 (1965)). Petitioner contends (Pet. 8-9, 12-16), however, that the FTCA essentially calls for a different result when the United States files a third-party complaint for contribution against a state in federal court. The Eleventh Amendment would bar federal court jurisdiction over such an action filed by a private individual. In petitioner's view, the Eleventh Amendment similarly prohibits federal court jurisdiction where the United States files the claim because the federal government, under the FTCA, "merely stands in the shoes of a private party" (Pet. 10).

2. Petitioner's syllogistic reasoning rests on a faulty premise. As the court of appeals correctly pointed out

[8] The court of appeals' resolution of the jurisdictional issue, namely, that the denial of the state's Eleventh Amendment claim is an immediately appealable collateral order, does conflict with the First Circuit's holding in *Libby* v. *Marshall*, 833 F.2d 402, 406 (1987) (Eleventh Amendment claim, intended primarily to protect the state's treasury rather than prevent the "indignity of [the state's] being 'haled into court,' " not immediately appealable). Petitioner has not presented this issue for review, see Rule 21.1(a) of the Rules of this Court, and in light of the court of appeals' proper disposition on the merits of the Eleventh Amendment question that petitioner does present—a disposition affirming the decision of the district court—there is no need for the Court to consider that separate jurisdictional issue now. Moreover, the uncertainty surrounding the court of appeals' jurisdiction over this interlocutory appeal is another reason against review at this time. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 (1982).

(Pet. App. 15a), the United States has agreed that for purposes of determining its *liability* to a claimant, it should be treated as a private person under state law, but it has not consented to be treated as a private individual in all respects. Even with respect to questions of liability, for example, the FTCA expressly bars recovery of punitive damages and prejudgment interest against the United States, and the statute vests exclusive jurisdiction of tort claims against the United States in the federal courts without trial by jury. See 28 U.S.C. 2402, 2674. Thus the FTCA, as a limited waiver of the sovereign immunity of the United States, defines the substantive law applicable to tort claims *against* the federal government, but contrary to petitioner's suggestion, it simply does not limit the rights of the United States as a plaintiff pursuing a cause of action in federal court under 28 U.S.C. 1345 and the applicable rules of civil procedure. Cf. *United States* v. *California*, 655 F.2d 914, 918 (9th Cir. 1980).

3. Petitioner, relying on *Horton* v. *United States*, 622 F.2d 80 (4th Cir. 1980) (per curiam), and *Hill* v. *United States*, 453 F.2d 839 (6th Cir. 1972), also argues (Pet. 9-11) that the United States, under the regime of the FTCA, must yield to the state's effort to restrict contribution actions to state court. That argument fails: *Horton* and *Hill* held only that where the state has not waived its immunity from tort liability by providing a cause of action, the United States may not pursue a cause of action for contribution or indemnification in any court. See 622 F.2d at 81-82 (South Carolina provides no right of contribution or indemnification among joint tortfeasors); 453 F.2d at 842 (in absence of common liability between joint tortfeasors, contribution not available under Tennessee law). In the present case, petitioner has waived its immunity from suit in tort and has provided a cause of action for contribu-

tion. See page 4 and note 6, *supra*.[9]

Petitioner's effort to limit contribution suits against it to state court may not dictate the United States' choice of forum. The Constitution (Art. III, § 2, Cl. 1), together with the jurisdictional grant of 28 U.S.C. 1345,[10] enables the United States to pursue enforcement of its substantive rights in federal court. Under the Supremacy Clause, those federal provisions trump the state's effort to restrict the federal government to a state forum. See, *e.g.*, *United States* v. *Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987). Cf. *Railway Co.* v. *Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1871) (state may not preclude the exercise of federal diversity jurisdiction by statute limiting wrongful

[9] Petitioner attempts to analogize this case to *United States* v. *Illinois*, 454 F.2d 297 (7th Cir. 1971), which allowed the United States to make a third-party claim for *indemnification* against the State of Illinois even though state law authorized no such claim (Pet. 11-12). The analogy is inapt because the court of appeals here looked to state law as the source of the government's claim for contribution. Cf. *Overseas Nat'l Airways, Inc.* v. *United States*, 766 F.2d 97, 102 (2d Cir. 1985) (suggesting, in light of *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951), that "state law generally governs claims of the United States for contribution"). Thus, this case does not present the Court with the question whether the United States may have a right of contribution independent of state law.

[10] We have found only one reported decision holding that the United States could not file a third-party claim against a state because such a claim was not an action "commenced by the United States" within the meaning of 28 U.S.C. 1345. *Parks* v. *United States*, 241 F. Supp. 297, 299-300 (N.D.N.Y. 1965). No other court has followed that holding. See, *e.g.*, *United States* v. *Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987); *United States* v. *Illinois*, 454 F.2d 297, 301 & n.3 (7th Cir. 1971), cert. denied, 406 U.S. 918 (1972); *Williams* v. *United States*, 42 F.R.D. 609, 611-612 (S.D.N.Y. 1967). Indeed, the court that decided *Parks* no longer adheres to that case's ill-fated interpretation of Section 1345. *Antraidoms* v. *United States*, 96 F.R.D. 43, 44 (N.D.N.Y. 1982).

death actions to state court).[11] For this reason as well, petitioner's argument (Pet. 13-14) that under the FTCA the United States should not be in any "better position" than a similarly-situated private individual misses the mark. The Constitution itself requires such different treatment because Article III, as applied in 28 U.S.C. 1345, confers jurisdiction on the federal courts over controversies in which the United States is a party plaintiff and such jurisdiction is not restricted by the Eleventh Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Decisions like *Smith* v. *Reeves*, 178 U.S. 436 (1900), are not to the contrary. Those decisions simply permit a state to limit private actions against it to its own courts and at the same time to retain its Eleventh Amendment immunity—an immunity that has no application in a suit against a state by the United States.

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